Supreme Court, U.S.
FILED

09-725 DEC 17 2009

No. 09- OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

THOMAS M. BEAVER, M.D.;
SIGURD J. NORMANN, M.D.; DIANA CARDONA, M.D.;
and THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,

Petitioners,

v.

PATRICIA DANNEMANN,

Respondent.

On Petition for a Writ of Certiorari to the Florida First District Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

SUSAN L. KELSEY
KELSEY APPELLATE LAW FIRM, P.A.
115 N. Calhoun Street
Tallahassee, FL 32301
(850) 681-3511

Attorney for Petitioners

QUESTION PRESENTED

May a state law on healthcare privacy limit a physician's constitutional right to counsel?

LIST OF PARTIES

All parties to the proceeding in the court whose judgment is the subject of this petition are listed in the caption of the case on the cover page.

The named defendant in the trial court, Shands Teaching Hospital and Clinics, Inc., did not participate in state court appellate review and is not participating here.

TABLE OF CONTENTS

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 19

INDEX TO APPENDICES

Appendix A Decision under review, *Dannemann v. Shands Teaching Hosp. & Clinics, Inc.*, 14 So. 3d 246 (Fla. 1st Dist. Ct. App.), *rev. denied*, 19 So. 3d 987 (Fla. 2009). 1a

Appendix B Trial Court order (unpublished). 5a

Appendix C Florida Supreme Court Order denying discretionary review, *University of Florida Board of Trustees v. Dannemann*, 19 So. 3d 987 (Fla. Sept. 24, 2009) (table)..... 17a

TABLE OF AUTHORITIES CITED

PAGES

CASES

Acosta v. Richter,
671 So.2d 149 (Fla. 1996) 18, 19

Citizens for Health v. Leavitt,
428 F.3d 167, 177 & n.10 (3d Cir. 2005), *cert. denied*, 549 U.S. 941 (2006)..... 16

Dannemann v. Shands Teaching Hospital and Clinics, Inc.,
14 So. 3d 246 (Fla. 1st Dist. Ct. App.), *rev. denied*, 19 So. 3d 987 (Fla. 2009). ..... passim

Denius v. Dunlap,
209 F.3d 944 (7th Cir. 2000)..... 11, 17

Fabre v. Marin,
623 So. 2d 1182 (Fla. 1993) 6

Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.,
479 U.S. 238 (1986). 15

Gray v. New England Tel. & Tel. Co.,
792 F.2d 251, 257 (1st Cir. 1986)..... 10

Hannon v. Roper,
945 So.2d 534 (Fla. 1st DCA 2006), *rev. denied*, 967 So.2d 198 (Fla. 2007), ... 7, 8

In Re: BellSouth Corp.,
334 F.3d 941, 961 (11th Cir. 2003)..... 10

Martin v. Lauer,
686 F. 2d 24 (D.C. Cir. 1982)..... 12, 13

McCuin v. Texas Power & Light Co.,
714 F.2d 1255, 1262 (5th Cir. 1983)..... 10

Peters v. Goodyear Tire & Rubber Co.,
76 N.E. 2d 412, 416-17 (Ohio 1947)..... 14

Potaschnick v. Port City Construction Co.,
609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820
(1980). 11

Powell v. Alabama,
287 U.S. 45, 69 (1932). 10

State ex rel. Helseth v. Du Bose,
99 Fla. 812, 128 So. 4, 6 (1930). 8

Texas Catastrophe Prop. Ins. Assoc. v. Morales,
975 F. 2d 1178, 1181 (5th Cir. 1992), *cert. denied*,
507 U.S. 1018 (1993). 15

Upjohn Co. v. United States,
449 U.S. 383, 389 (1981). 11, 14

Whalen v. Roe,
429 U.S. 589, 602 & n.29 (1977) 16

Women in City Government United v. City of New York,
112 F.R.D. 29, 32 (S.D. NY 1986) 13

STATUTES

28 U.S.C. § 1257(a)..... 1

§ 456.057(6), Fla. Stat. (2006)..... 7

§ 456.057(8), Fla. Stat. (2007)..... 2, 3

CONSTITUTIONAL PROVISIONS

Amend. I, U.S. Const. 2, 8, 11, 18

Amend. XIV § 1, U.S. Const..... 2, 8, 9

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the Petition (Pet. App. 1a), and is reported at *Dannemann v. Shands Teaching Hospital and Clinics, Inc.*, 14 So. 3d 246 (Fla. 1st Dist. Ct. App.), *rev. denied*, 19 So. 3d 987 (Fla. 2009).

JURISDICTION

The date on which the highest state court decided this case on the merits was May 11, 2009. (Pet. App. 1a) The Florida Supreme Court denied discretionary review of this case on September 24, 2009. *University of Florida Board of Trustees v. Dannemann*, 19 So. 3d 987 (Fla. 2009) (table) (Pet. App. 17a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the free speech clause of the First Amendment to the United States Constitution, and the due process clause of the Fourteenth Amendment; and specifically their guarantee of the right to legal counsel. Amend. I, U.S. Const. ("Congress shall make no law ... abridging the freedom of speech ... ."); Amend. XIV § 1, U.S. Const. ("No state shall ... deprive any person of life, liberty, or property, without due process of law ... .").

In addition, the case involves the Florida patient-privacy statute, section 456.057(8), Florida Statutes (2007), which provides as follows:

> (8) Except in a medical negligence action or administrative proceeding when a health care practitioner or provider is or reasonably expects to be named as a defendant, information disclosed to a health care practitioner by a patient in the course of the care and treatment of such patient is confidential and may be disclosed only to other health care practitioners and providers involved in the care or treatment of the patient, or if permitted by written authorization from the patient or compelled by subpoena at a deposition, evidentiary hearing, or trial for which proper notice has been given.

STATEMENT OF THE CASE

This case pits a state statutory right of privacy in healthcare information, against the constitutional right to counsel and to engage in free speech within the attorney-client relationship. The Florida First District Court of Appeal interpreted Florida's patient-privacy statute, section 456.057(8), Florida Statutes (2007), as an absolute prohibition on Petitioners' communicating with their own legal counsel about Respondent's decedent's medical information. The Florida court prohibited such attorney-client communication despite the fact that Respondent filed suit for her late husband's wrongful death and sought to depose the individual physician-Petitioners as non-party fact witnesses about decedent's medical information. These physicians are employed by the University of Florida Board of Trustees (UFBOT), and participated in creating the very medical records at issue in Respondent's lawsuit, in the course of their employment with UFBOT. (Pet. App. 9a)

When Respondent sought to depose these physicians, Petitioners asserted that they had the right to communicate freely with their legal counsel, specifically including the right to communicate with counsel about decedent's medical information relevant to the lawsuit and these physicians' impending depositions. (Pet. App. 7a) Respondent moved the trial court for a protective order prohibiting the Petitioners from communicating her late husband's medical information to legal counsel

prior to the physicians' depositions, relying on the literal language of the Florida patient-privacy statute. (*Id.*) Petitioners sought a court order authorizing unhindered communication with their legal counsel, asserting, among other things, that the Florida statute could not be applied to deprive them of their right to counsel under Florida law and the First and Fourteenth Amendments to the United States Constitution. (Pet. App. 10a-12a)

The trial court rendered an order granting the UFBOT-employed physician witnesses the right to communicate freely with their legal counsel, specifically including decedent's medical information. (Pet. App. 5a) The trial court expressly acknowledged that the UFBOT physicians have constitutional guarantees of free speech, privacy, and the right to confer with counsel, which deserve protection, concluding that there was no "compelling State interest to warrant such a restraint and infringement on privacy [as between attorney and client]":

> With respect to Plaintiff's contention that the proposed physician deponents be prohibited from talking to their attorney with respect to anticipated areas of inquiry, a very important question is raised. What legitimate state interest exists within the context of this case to prevent such a discussion? The question arises because of the constitutional guarantees of freedom of speech, privacy, and the right to confer with

counsel regarding one's legal rights and the protection of one's property interests that may be affected by participating in this judicial proceeding as a witness. In this case, we not only deal with a deceased person's medical information, the protection of which, being based on notions of personal privacy, is not as critical a concern as if the patient were still alive, but also medical information that is already the subject of a public forum. Additionally, the subject medical information at issue is already completely known to the Plaintiff (and her attorney) in this action, by the proposed physician deponents, and by the named Defendant (and its attorney). Therefore, in the context of this case, the parties and the proposed deponents all have knowledge of the medical information at issue, and the public has a right of access to it as it becomes part of the court record, but the Plaintiff nonetheless argues that § 456.057 prevents the proposed physician deponents from talking about this information with their own attorney prior to their depositions being taken. To interpret § 456.057 in such a manner as to prohibit witnesses from conferring with counsel under such circumstances would render the statute unconstitutional due to the absence of any compelling state interest to warrant such a restraint and infringement on privacy. All of the proposed deponents have rights to speech, privacy, and to confer with

> counsel regarding their legal rights. With respect to the physician witness who participated in caring for the deceased, there are rights to due process in the protection of additional legal interests, such as protection from exposure to a *Fabre [v. Marin*, 623 So. 2d 1182 (Fla. 1993)] attack, if for no other reason, for the sake of maintaining professional reputation, and the risk of being reported to national and state data banks and credentialing committees, all of which can impact a physician's livelihood.

(Pet. App. 10a-11a) The trial court refrained from declaring the state statute unconstitutional as applied, instead deciding that the physicians' right to communicate freely with their counsel was adequately established on state-law grounds; but noting that if the state-law grounds were inadequate, unconstitutionality was an alternative basis for the ruling. (Pet. App. 11a-13a)

Respondent petitioned the Florida First District Court of Appeal for a writ of certiorari, which the Florida court granted. (Pet. App. 1a) In its opinion, the Florida court adhered to an earlier decision in which it had interpreted the Florida statute narrowly -- and without reference to the federal constitutional issues -- as allowing the communication of patient healthcare information *only* in the four instances expressly enumerated in the statute. (Pet. App. 2a) On this reasoning, the Florida court interpreted the Florida statute as

precluding physicians and their employers from communicating freely with legal counsel about patients' medical information, unless one of the four enumerated patient-privacy exceptions applied:

> This court held in *Hannon [v. Roper,* 945 So.2d 534 (Fla. 1st DCA 2006), *rev. denied*, 967 So.2d 198 (Fla. 2007)], that the clear, unambiguous language of the patient confidentiality statute, section 456.057(6), Florida Statutes (2006), presently numbered as subsection (8), prohibits any nonparty physician from disclosing the decedent's medical condition and history to the counsel hired by the defendant's insurer to represent the physician at a deposition. We explained that there are only four circumstances that would allow a health care practitioner or provider to discuss a patient's medical condition and treatment, *Hannon,* 945 So.2d at 536, and none of those circumstances are present in this case.

Dannemann, 14 So. 3d at 247-48 (Pet. App. 2a-3a)

Before the Florida appellate court, Petitioners again asserted their First-Amendment and Fourteenth-Amendment rights to have legal counsel and to communicate freely with counsel, but the Florida court expressly rejected those arguments:

> Respondents [Petitioners here] raise the same constitutional issues that were raised in *Hannon*. Specifically, respondents contend that our application of section 456.057 in *Hannon* violates the physicians' constitutional right to counsel protected by the free speech clause of the First Amendment and their rights under the due process clause of the Fourteenth Amendment. Amend. I, U.S. Const.; Amend. XIV § 1, U.S. Const. Respondents urge us to address these issues, arguing that they were unresolved in *Hannon*. Certainly, "no decision is authority on any question not raised and considered ... ." *State ex rel. Helseth v. Du Bose*, 99 Fla. 812, 128 So. 4, 6 (1930). Even though this court in *Hannon* did not discuss the constitutional issues raised there, the court's silence supports the necessary conclusion that those issues were considered and rejected. In *Hannon*, the court granted relief based upon section 456.057(6), which it could not have done had it been persuaded the statute was constitutionally infirm.

Dannemann, 14 So. 3d at 248 (Pet. App. 3a-4a). The Florida appellate court conducted no balancing test such as that the trial court had employed. (*See id.*) Petitioners timely sought discretionary review in the Florida Supreme Court, which was denied. (Pet. App. 17a)

REASONS FOR GRANTING THE PETITION

The Court should grant the Petition because the Florida court's decision impermissibly restricts the constitutional right to counsel, and is particularly susceptible to broad abuse in the hotbed context of healthcare privacy. The Florida court's error was its failure to recognize that no state statute may restrict a right guaranteed by the United States Constitution; that is, that federal constitutional rights, including the right to counsel, are implicit exceptions to, or limits on, the Florida patient-privacy statute, as on all state statutes. The decision merits this Court's review not only because the decision is wrong; but because it is wrong about an important and fundamental constitutional right, and the Florida court's reasoning jeopardizes the constitutional rights of every healthcare provider, and every employer of healthcare providers, nationwide.

A. The Florida Court's Ruling Violates Petitioners' First and Fourteenth Amendment Rights.

Petitioners enjoy the right to counsel, and the right to communicate freely with that counsel, under the United States Constitution. The right to counsel in civil cases is "no less fundamental" than the Sixth-Amendment right to counsel in criminal cases. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255,

1262 (5th Cir. 1983).[1] Counsel denied is due process denied:

> If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Powell v. Alabama, 287 U.S. 45, 69 (1932). The right to counsel in civil cases "inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights." *Mosley v. St. Louis Southwestern Railway*, 634 F.2d 942, 945 (5th Cir.), *cert. denied*, 452 U.S. 906 (1981).

---

[1] The First, Fifth, Seventh, Eleventh, and District of Columbia Circuits all have held that there is a constitutional right to counsel in civil cases or administrative proceedings. In addition to the cases cited in the text, *see In Re: BellSouth Corp.*, 334 F.3d 941, 961 (11th Cir. 2003) ("Because a party is presumptively entitled to the counsel of his choice, that right may be overridden only if 'compelling reasons' exist."); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257 (1st Cir. 1986) ("a civil litigant does have a constitutional right, deriving from due process, to retain hired counsel in a civil case").

The right to counsel in civil cases arises out of First Amendment rights. *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000). In *Denius*, the Seventh Circuit stated that "[t]he right to hire and consult an attorney is protected by the First Amendment's guarantee of freedom of speech, association and petition" and "prohibits the state from interfering with collective action by individuals to seek legal rights and retain legal counsel." *Id.* at 953-54. The right to counsel in civil matters extends to any legal matter, and is not simply limited to formal representation in hearings or court proceedings. "[T]he state cannot impede an individual's ability to consult with counsel on legal matters" and "the First Amendment protects the right of an individual or group to consult with an attorney on *any* legal matter." *Id.* at 954 (emphasis added). A lawyer deprived of the very information as to which legal advice is sought is no lawyer at all, because the essence of the attorney-client relationship is full and frank communication. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

The Fourteenth-Amendment underpinnings of the right to counsel in civil cases are set forth in *Potaschnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). The trial court in *Potaschnick* had prohibited defense counsel from conferring with his client during breaks and recesses in the client's testimony. 609 F.2d at 1117. The Fifth Circuit noted that a civil litigant's right to counsel was "rooted" in "notions of due

process" and that in civil matters, just as much in criminal cases, a litigant requires the "guiding hands of counsel in every step of the proceeding against him." *Id.* at 1118. The right to counsel is of "constitutional dimensions and should thus be freely exercised without impingement." *Id.* The Fifth Circuit reversed the trial court's order because it violated the defendant's due process right to counsel. *Id.* at 1119.

A particularly instructive case emphasizing the constitutional right to unfettered attorney-client communications is *Martin v. Lauer*, 686 F. 2d 24 (D.C. Cir. 1982). In *Martin*, two government employees consulted an attorney to discuss bringing a lawsuit challenging a workforce reduction by their employing agency. The agency asserted that the employees had no right to convey to their attorney any information that would be confidential and exempt from disclosure under the Freedom of Information Act, and issued an order demanding that the two employees disclose all such information they had given their lawyer. The agency then obtained from the district court an injunction enforcing the order. 686 F. 2d at 31.

Although the district court order in *Martin* prevented the two government employees from disclosing to their attorney information "confidential" under the Freedom of Information Act, the District of Columbia Circuit Court quashed that order. The Circuit Court held that the employees had "an undeniable right to retain counsel to

ascertain their legal rights" and an interest in "speaking freely with their attorneys," *id.* at 32; and rejected the imposition of such restrictions on attorney-client communications:

> Restrictions on speech between attorneys and their clients directly undermine the ability of attorneys to offer sound legal advice. As the common law has long recognized, the right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems.

Id. The *Martin* court also acknowledged the employees' "legitimate interest in an early assessment of their legal rights" and held that both the employees' "speech interest" and "fundamental right of access to the courts" deserve "rigorous protection." *Id.* at 33.

Under these authorities, the UFBOT physician-witnesses have a constitutional right to consult with their legal counsel *and* to communicate freely with counsel.[2] For the attorney-client

---

[2] The law likewise demands that witnesses, whether or not parties to litigation, have the benefit of legal representation during a deposition. *E.g., Women in City Government United v. City of New York*, 112 F.R.D. 29, 32 (S.D. N.Y. 1986) ("[a] person being deposed, whether a party or a non-party witness, is

relationship to be meaningful, it must encompass unfettered communication, even to the extent of conveying otherwise private patient health care information to counsel. *See Upjohn*, 449 U.S. at 389. The Florida court erred in failing to acknowledge and protect that constitutional right.

The Florida court likewise erred in failing to analyze the relative weight of the competing claims to healthcare privacy and right to counsel, although the trial court had performed the requisite evaluation and determined that the right to counsel must prevail. Where, as here, there is a constitutional right to counsel in a civil matter, a state may not impinge upon that right without a compelling reason. *Texas Catastrophe Prop. Ins.*

---

entitled to have counsel present at his deposition."). The right to counsel during a deposition is so strong that a witness may appropriately refuse to testify if his lawyer is excluded from the deposition. *Peters v. Goodyear Tire & Rubber Co.*, 76 N.E. 2d 412, 416-17 (Ohio 1947) ("Constitutional or legal privileges given to the people of a sovereign state are such as bestow upon those people the inherent or implied right to employ such legal representation as assures them the preservation of those privileges."). Here, the Respondent's position was that the physicians could have their lawyer present at their depositions, but could not communicate freely with counsel prior to those depositions. To be meaningful, the right to counsel *during* a deposition must extend to pre-deposition consultation.

Assoc. v. Morales, 975 F. 2d 1178, 1181 (5th Cir. 1992), *cert. denied*, 507 U.S. 1018 (1993). Any state statute that burdens First-Amendment rights must serve a compelling governmental interest and must be as narrowly tailored as possible. *See, e.g., Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986).

The trial court correctly concluded that the Florida patient-privacy statute creates no compelling reason to justify any infringement on physicians' right to counsel. (Pet. App. 11a) The factual context illustrates the marked weakness in the privacy claim, involving as it does publicly-filed litigation placing the decedent's medical information squarely at issue, pre-suit exchanges of information and subsequent discovery involving exactly that same information, the fact that the physician-witnesses at issue actually participated in developing the decedent's medical information in the course of their employment with UFBOT, and the fact that the subject matter of the physician-witnesses' requested depositions would necessarily involve decedent's medical information. (Pet. App. 9a-11a) Compared to the physicians' constitutional right to the benefit of legal counsel, and the concomitant right to communicate freely with that counsel upon being called to testify in depositions about the decedent's medical care, the claim of privacy under the Florida statute becomes insignificant.

The conclusion that no compelling state interest justifies the restriction of physicians'

constitutional right to counsel is bolstered by the existence of valid laws and regulations recognizing that even "private" medical information is subject to disclosure for legitimate reasons, particularly when the context of its disclosure is itself protected by independent guarantees of confidentiality. The right to privacy in healthcare information, though the subject of significant regulation and litigation in recent years, did not exist at common law, and since its inception has always been limited to allow for legitimate disclosures of that information in appropriate contexts. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 602 & n.29 (1977) ("disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient") (also noting the propriety of other state recordkeeping and reporting requirements). In the attorney-client context, no less than in these regulatory contexts, the disclosure of healthcare information is both legitimate and protected from further disclosure, and this truth weighs heavily in favor of concluding that physicians must be permitted to communicate patient medical information to their own legal counsel in the context of an attorney-client relationship.

The limits on the right to healthcare privacy are "largely unresolved." *Citizens for Health v. Leavitt*, 428 F.3d 167, 177 & n.10 (3d Cir. 2005), *cert. denied*, 549 U.S. 941 (2006). Nevertheless,

disclosures of healthcare information are constitutionally permissible in a wide variety of contexts, *none* of which rises to the higher level of the constitutionally-protected right to counsel at issue here. Once undertaken, the balancing test must produce the conclusion that Florida's state statutory right to healthcare privacy cannot supersede the Federal constitutional right to counsel.

The Florida appellate court's holding to the contrary, summarily concluding that the Florida statutory right to privacy in healthcare information outweighs the constitutional right to counsel, violates both the First-Amendment right to free speech and association, and the Fourteenth-Amendment due process clause. *Denius*, 209 F. 3d at 953-54; *Texas Catastrophe*, 975 F. 2d at 1181. As applied by the Florida appellate court, the Florida patient-privacy statute impermissibly burdens physicians' rights of association and speech with legal counsel, employers, and management personnel. This Court should grant the Petition, vacate the Florida court's decision, and remand this case so that the Florida court's improper infringement on physicians' constitutional right to counsel may be rectified.

B. The Florida Court's Ruling Was Not Supported By Florida Precedent.

This Court should grant the Petition for the additional purpose of forestalling future reliance on an incorrect interpretation of Florida Supreme Court precedent. The Florida intermediate appellate court stated that it was constrained by Florida Supreme Court precedent to reject Petitioners' First-Amendment claims:

> Further, we note that in *Acosta [v. Richter*, 671 So.2d 149 (Fla. 1996)], the [Florida] Supreme Court rejected the argument that the limitations on disclosure in section 455.241(2), Florida Statutes (1993) [the predecessor to current section 456.057(8)], are "somehow violative of a defendant physician's First Amendment rights to free speech." *Acosta*, 671 So.2d at 156.

Dannemann, 14 So. 3d at 248 (Pet. App. 4a).

Acosta, however, involved a materially different First-Amendment speech issue, not the First-Amendment right-to-counsel issue involved here. In *Acosta*, a medical negligence action named two physicians as defendants. 671 So. 2d at 150. The plaintiff was being treated by *other* physicians. The lawyer representing the two defendant physicians sought to communicate *ex parte* with the plaintiff's non-party treating physicians. *Id. Acosta*

nowhere states or even implies the existence of any attorney-client relationship between the treating physicians and the lawyer who wanted to talk with them about the plaintiff's medical condition. This fact renders *Acosta* materially distinguishable from this case, involving a direct attorney-client relationship between the physician-witnesses and their legal counsel.

The Florida court failed to appreciate this material factual distinction between *Acosta*, which did *not* involve a physician's communications with his *own* lawyer, and this case, which does. Correctly analyzed in light of its particular facts, *Acosta* neither requires nor supports the result the Florida court reached here. This error merits this Court's correction to keep other courts from following suit in other patient-privacy cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Susan L. Kelsey
KELSEY APPELLATE LAW FIRM, P.A.
115 N. Calhoun St.
Tallahassee, FL 32301
Ph. (850) 681-3511
Attorney for Petitioners

December 17, 2009

APPENDIX

APPENDIX A

DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

Patricia DANNEMANN, Petitioner,
v.
SHANDS TEACHING HOSPITAL AND CLINICS, INC.; Thomas M. Beaver, M.D.; Sigurd J. Normann, M.D.; Diana Cardona, M.D.; and University of Florida Board of Trustees, Respondents.
No. 1D08-3923
[14 So.3d 246, 34 Fla. L. Weekly D945]

May 11, 2009

On Motion for Rehearing and Clarification

VAN NORTWICK, J.

Upon consideration of the Motion for Rehearing and Clarification, our opinion of March 13, 2009, is withdrawn and the following substituted therefor.

Patricia Dannemann, the plaintiff in a suit which alleges that employees of Shands Teaching Hospital and Clinics, Inc. (Shands) negligently caused the death of her husband, seeks certiorari review of an order denying her motion to prohibit pre-deposition conferences between nonparty physicians, Dr.

Beaver, Dr. Normann, and Dr. Cardona, employed by the University of Florida Board of Trustees (UFBOT), also a nonparty, and the counsel hired by the University of Florida Self Insurance Program (SIP), to represent these physicians at their depositions. SIP insures and defends both Shands and the University. The order would allow the physician witnesses to discuss the decedent's medical condition. Because this case is controlled by our previous decision in *Hannon v. Roper*, 945 So.2d 534 (Fla. 1st DCA 2006), and the Florida Supreme Court's decision in *Acosta v. Richter*, 671 So.2d 149 (Fla.1996), we grant the petition and quash the trial court's order.

Hannon also involved a suit against Shands for alleged medical malpractice causing the death of Hannon's son. This court held in *Hannon* that the clear, unambiguous language of the patient confidentiality statute, section 456.057(6), Florida Statutes (2005), presently numbered as subsection (8), prohibits any nonparty physician from disclosing the decedent's medical condition and history to the counsel hired by the defendant's insurer to represent the physician at a deposition. We explained that there are only four circumstances that would allow a health care practitioner or provider to discuss a patient's medical condition and treatment, *Hannon*, 945 So.2d at 536, and none of those circumstances are present in this case. The legislature created the physician-patient privilege by statute "where none existed before, and [provided] an explicit but limited

scheme for the disclosure of personal medical information." *Acosta,* 671 So.2d at 154. Though respondents believe the statute is ill-conceived, that is a matter for the legislature to address.

Respondents raise the same constitutional issues that were raised in *Hannon.* Specifically, respondents contend that our application of section 456.057 in *Hannon* violates the physicians' constitutional right to counsel protected by the free speech clause of the First Amendment and their rights under the due process clause of the Fourteenth Amendment. Amend. I, U.S. Const.; Amend. XIV § 1, U.S. Const. Respondents urge us to address these issues, arguing that they were unresolved in *Hannon.* Certainly, "no decision is authority on any question not raised and considered...." *State ex rel. Helseth v. Du Bose,* 99 Fla. 812, 128 So. 4, 6 (1930). Even though this court in *Hannon* did not discuss the constitutional issues raised there, the court's silence supports the necessary conclusion that those issues were considered and rejected. In *Hannon,* the court granted relief based upon section 456.057(6), which it could not have done had it been persuaded the statute was constitutionally infirm. We are bound by *Hannon* under the doctrine of *stare decisis. N. Fla. Women's Health and Counseling Servs., Inc. v. State,* 866 So.2d 612, 637 (Fla.2003) ("The doctrine of *stare decisis,* or the obligation of the court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of

Anglo-American jurisprudence for centuries."). Further, we note that in *Acosta* the Supreme Court rejected the argument that the limitations on disclosure in section 455.241(2), Florida Statutes (1993), are "somehow violative of a defendant physician's First Amendment rights to free speech." *Acosta*, 671 So.2d at 156.

The petition for writ of certiorari is GRANTED and the trial court's order is QUASHED.

PADOVANO, AND CLARK, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE EIGHTH JUDICIAL CIRCUIT IN AND FOR ALACHUA COUNTY, FLORIDA

PATRICIA DANNEMANN,
As Personal Representative
Of the Estate of STEPHEN
DANNEMANN,

Plaintiff,

v.

CASE NUMBER:
01-2007-CA-3643
DIVISION: K

SHANDS TEACHING
HOSPITAL AND CLINICS,
INC.,

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION TO PROHIBIT PRE-DEPOSITION CONFERENCES AND GRANTING NON-PARTY WITNESSES' MOTION FOR LEAVE TO CONSULT WITH COUNSEL

THIS CAUSE came before the Court for hearing on cross motions for protective orders filed on behalf of three non-party witnesses and on behalf of the Plaintiff. The witnesses are physicians, and the issue at hand involves whether these physicians may, prior to their depositions being taken, discuss with their attorney matters pertaining to the medical condition, care and treatment of a deceased patient. Plaintiff's attempt to schedule the depositions of these physician witnesses gave rise to these competing motions.

This is an action for medical negligence filed by Patricia Dannemann, as personal representative of the Estate of Stephen Dannemann, deceased. The action has been filed solely against Shands Teaching Hospital and Clinics, Inc., for alleged negligence of said Defendant's employees while the deceased was a patient at Shands from April 5, 2005 through May 8, 2005. During his hospitalization, Mr. Dannemann had a left ventricular assist device surgically implanted. A cannula attached to tubing from this device was allegedly pulled from the patient's left ventricle while he was being turned by Shands' health care personnel. Mr. Dannemann died on May 8, 2005, and Plaintiff alleges that his death was the result of this episode.

Defendant Shands has answered the complaint by denying the alleged negligence and by asserting certain affirmative defenses. Among Defendant's affirmative defenses is one typically

referred to as a *Fabre* [*v. Marin*, 623 So. 2d 1182 (Fla. 1993)] defense under § 768.81 [Florida Statutes (2007)]. Shands has conditionally identified "the physicians who cared for Plaintiff's decedent during the timeframe described in the complaint" as individuals who caused part or all of Plaintiff's damages. This description would include one of the three physician witnesses. The remaining two physician witnesses participated in the deceased's postmortem examination.

Plaintiff's motion for protective order relies heavily upon *Hannon v. Roper*, 945 So. 2d 534 (Fla. 1st DCA 2006) in seeking an order preventing various physicians employed by the University of Florida, among whom are the three physician witnesses, from communicating with any person, including any attorney hired for them by the University's self-insurance program, regarding the medical care, history, condition, treatment, prognosis or diagnosis of the deceased, Stephen Dannemann. The breadth of Plaintiff's requested relief would prevent the proposed deponents from having any pre-deposition conferences with their attorney concerning the anticipated subject matter of their testimony. Plaintiff argues that the provisions of § 456.057 prevent such communication and that none of the statutory exceptions apply.

Counsel for the three physician witnesses seeks a protective order granting them leave to consult with counsel in connection with their

pending discovery depositions to include discussions with their attorney about the decedent's medical information.

Initially, the Court questions whether making a motion for protective order under [Florida Rule of Civil Procedure] Rule 1.280 is the appropriate procedure for raising the issues brought before the Court. Neither party has challenged the methodology employed and it appears that the same device was employed and unchallenged in the *Hannon v. Roper* case. Certainly the physician witnesses are persons "from whom discovery is sought," as referred to in the rule, and a protective order would be available to prevent "annoyance, embarrassment, oppression, or undue burden or expense." Perhaps one could argue that attempting to take someone's deposition without giving them the opportunity to consult with counsel is a form of "oppression," giving that term a liberal interpretation. However, with respect to the Plaintiff's motion for protective order, it hardly seems to fit within any category set forth in Rule 1.280(c) no matter how liberally it may be construed. In any event, despite the rule under which the motions are brought, they do clearly appear to seek relief from the Court that is within a trial court's jurisdiction to grant since they pertain to the conduct of this litigation. *Brand v. Old Republic Nat. Title Ins. Co.*, 797 So. 2d 643, 645 (Fla. 3d DCA 2001) (recognizing trial court's inherent authority to control conduct of litigation).

As set forth above, this action concerns and is founded upon the medical condition, care and treatment of a deceased patient. Pleadings, written discovery, depositions, expert opinions, exhibits, witnesses, and jury trial will all focus upon, discuss, present and analyze the decedent's medical history. The records of this lawsuit, including deposition transcripts, constitute "court records" to which the public has access. Fla. R. Jud. Admin. 2.420(b). All court proceedings, and the eventual jury trial, are open to the public. The medical records and postmortem examination records concerning this deceased patient, insofar as the events underlying this action are concerned, were generated and are maintained by Defendant Shands, who by virtue of being the custodian of these records, possesses full knowledge of what they contain. These records were, by virtue of statutory pre-suit requirements, obtained by Plaintiff before suit was filed, and have also been the subject of discovery requests by the Plaintiff herein, giving Plaintiff full knowledge of what they contain. The physicians whom the Plaintiff seeks to depose will be required by subpoena to talk about the decedent's medical information at their depositions, and, because of their personal involvement in either the care or examination of the deceased and their previous access to the medical records, already have full knowledge concerning the decedent's medical information. Undoubtedly, these witnesses will refer to the medical records during their testimony to

refresh their recollection. The circumstance presents itself, then, whereby a deceased patient's medical information is the primary subject of a proceeding in a public forum wherein literally all the relevant participants (including the parties' attorneys) already possess full knowledge of the subject medical information and as to which the public has free access, but whereby the personal representative seeks to use the deceased's medical records privilege to prevent physician witnesses from speaking with their own counsel concerning their anticipated testimony at deposition.

With respect to Plaintiff's contention that the proposed physician deponents be prohibited from talking to their attorney with respect to anticipated areas of inquiry, a very important question is raised. What legitimate state interest exists within the context of this case to prevent such a discussion? The question arises because of constitutional guarantees of freedom of speech, privacy, and the right to confer with counsel regarding one's legal rights and the protection of one's property interests that may be affected by participating in this judicial proceeding as a witness. In this case, we not only deal with a deceased person's medical information, the protection of which, being based on notions of personal privacy, is not as critical a concern as if the patient were still alive, but also medical information that is already the subject of a public forum. Additionally, the subject medical information at issue is already completely known to the Plaintiff

(and her attorney) in this action, by the proposed physician deponents, and by the named Defendant (and its attorney). Therefore, in the context of this case, the parties and the proposed deponents all have knowledge of the medical information at issue, and the public has a right of access to it as it becomes part of the court record, but the Plaintiff nonetheless argues that § 456.057 prevents the proposed physician deponents from talking about this information with their own attorney prior to their depositions being taken. To interpret § 456.057 in such a manner as to prohibit witnesses from conferring with counsel under such circumstances would render the statute unconstitutional due to the absence of any compelling state interest to warrant such a restraint and infringement on privacy. All of the proposed deponents have rights to speech, privacy, and to confer with counsel regarding their legal rights. With respect to the physician witness who participated in caring for the deceased, there are rights to due process in the protection of additional legal interests, such as protection from exposure to a *Fabre* attack, if for no other reason, for the sake of maintaining professional reputation, and the risk of being reported to national and state data banks and credentialing committees, all of which can impact a physician's livelihood.

Notwithstanding the above constitutional implications, resolution of the matters before the Court do not necessarily require findings of unconstitutionality because the Court's

interpretation of this statute simply does not forbid the proposed physician deponents from having pre-deposition conferences with their attorney concerning all matters incidental to their involvement in and knowledge about the deceased's medical history. The essence of the subject statute is to prevent "disclosure." Communication of medical information by these witnesses within the scope of an attorney-client relationship would not constitute "disclosure" because it is confidential and privileged. Fla. Stat. 90.502; *See, e.g., XL Specialty Ins. Co. v. Aircraft Holdings,* 929 So. 2d 578, 585 (Fla. 1st DCA 2006) (even statutory provisions creating bad faith actions against insurance companies do not abrogate attorney-client privilege as to insurer's knowledge of and reaction to advice of counsel). Moreover, by voluntarily filing this lawsuit concerning the deceased's medical care and by seeking the physician witnesses' testimony in this litigation, the Plaintiff has waived any applicable confidentiality under § 456.057 as to the witnesses' consultation with counsel, particularly because the Plaintiff has voluntarily initiated an event likely to result in a witness seeking assistance of counsel. *Id.* at 586 (privilege may be waived by voluntary disclosure); § 90.508 (person having privilege as to disclosure of confidential matters waives privilege when matter is voluntarily disclosed); *Major League Baseball v. Morsani,* 790 So. 2d 1071, 1077 fn 12 (Fla. 2001) (conduct which implies voluntary and intentional relinquishment of right amounts to waiver of right); *Hill v. Ray Carter Auto Sales, Inc.*, 745 So. 2d 1136,

1138 (Fla. 1st DCA 1999) (conduct inconsistent with right results in waiver of right).

WHEREFORE, the Court finds, adjudges and orders as follows:

1. Under the circumstances set forth in this case, pre-deposition conferences by the three physician witnesses with their attorney do not constitute "disclosure" of medical information in violation of § 456.057.

2. By calling upon the three physician witnesses to testify in this public proceeding which the Plaintiff has initiated, the Plaintiff has waived any applicable privilege of confidentiality under § 456.057 regarding pre-deposition consultations with counsel by said witnesses.

3. Alternatively, if the witnesses' consultation with counsel amount to "disclosure," and the Plaintiff, by calling said witnesses to testify, has not waived the statutory privilege with respect to pre-deposition consultations with counsel, then, as applied to the circumstances of this case, § 456.057 would be unconstitutional insofar as it would prohibit these witnesses from talking about the deceased's medical information with counsel during pre-deposition conferences, because there is no legitimate or compelling state interest to warrant such a restriction on speech and on the right to seek

legal advice, nor to warrant such an infringement on the witnesses' privacy.

Before concluding, the Court notes two additional matters. First, the only issue ripe for consideration and resolution herein is whether the three physician witnesses (Doctors Beaver, Normann and Cardona) may discuss the deceased's medical information with counsel during pre-deposition conferences. Plaintiff's motion for protective order is addressed to "any other physicians employed by the University of Florida" who participated in the deceased's care and treatment, and requests that they be prevented from communicating with "any person." Other than the three physician witnesses who have sought their own protective order, no circumstances have been demonstrated giving rise to any justiciable controversy as to any other physicians employed by the University of Florida. Additionally, only Doctors Beaver, Normann and Cardona have been given due notice and an opportunity to be heard, and the scope of their involvement only pertains to conversations during pre-deposition conferences. The parties agree that the three physician witnesses are entitled to representation and consultation with their attorney during the depositions. Thus, the resolution of these matters by the Court only focuses on the anticipated pre-deposition conferences between these three physician witnesses and their counsel.

Secondly, although the parties have presented argument as to the applicability of *Hannon v. Roper* and on the issue of whether or not the three physician witnesses might fall within the "expected defendant" exception to 457.057, this Court does not perceive that the *Hannon v. Roper* opinion is controlling in this matter and does not base its decision on whether or not these three physician witnesses could ever be named as defendants in this action. The *Hannon* decision only involved the statutory exception applicable to a health care provider who is or expects to be a named defendant in a medical negligence action. The *Hannon* decision found that exception to be inapplicable under the circumstances of that case. The decision reached by this Court in this case is based upon the absence of any disclosure under the circumstances presented and a waiver of the privilege, and, alternatively, the statute's unconstitutionality as applied to the circumstances of this case, none of which were addressed by the *Hannon* decision.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Plaintiff's motion for protective order is DENIED insofar as it seeks to prevent Doctors Beaver, Normann and Cardona from discussing the deceased's medical information with counsel during pre-deposition conferences; and the motion of Doctors Beaver, Normann and Cardona for leave to consult with counsel in connection with their impending discovery

depositions, to include a discussion concerning the deceased's medical information, is GRANTED.[1]

DONE AND ORDERED in Chambers at Gainesville, Alachua County, Florida, on July 11, 2008.

/s/ Toby S. Monaco
TOBY S. MONACO,
Circuit Judge

---

[1] The Court notes that the University of Florida Board of Trustees has joined in the motions with Doctors Beaver, Normann and Cardona. It does not, however, appear that any designated representative of UFBOT is being scheduled for deposition, and consequently UFBOT does not appear to have direct standing to raise any justiciable controversy at this point.

APPENDIX C

SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 24, 2009

CASE NO.: SC09-1006
Lower Tribunal No(s): 1D08-3923,
01-2007-CA-3643

UNIVERSITY OF FLORIDA BOARD OF TRUSTEEES, ET AL., PETITIONERS
vs.
PATRICIA DANNEMANN, ET AL., RESPONDENTS.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

QUINCE, C.J., and PARIENTE, LEWIS, CANADY, and POLSTON, JJ., concur.

Supreme Court, U.S.
FILED
FEB 22 2010
OFFICE OF THE CLERK

No. 09-725

In The
Supreme Court of the United States

THOMAS M. BEAVER, M.D.; SIGURD J. NORMANN, M.D.; DIANA CARDONA, M.D.; AND THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,

Petitioners,

v.

PATRICIA DANNEMANN,

Respondent.

On Petition For A Writ Of Certiorari To The Florida First District Court Of Appeal

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR A WRIT OF CERTIORARI

JAMES J. TAYLOR JR.
TAYLOR & TAYLOR P.A.
Post Office Box 2000
Keystone Heights, Florida 32656
(352) 473-8088
Email: jtaylor@taylorandtaylorpa.com

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF THE CASE	1
ARGUMENT	8
I. Petitioners Seek To Subvert, Not Uphold, The Attorney-Client Relationship	8
II. *Dannemann* Did Not Deny The Petitioner Physicians The Right To Retain Counsel Of Their Choosing	10
III. Physicians' Legitimate Desire To Consult With Counsel Is Not Infringed By Section 456.057(8)'s Privacy Right	11
CONCLUSION	15

TABLE OF AUTHORITIES

Page

CASES

Acosta v. Richter, 671 So. 2d 149 (Fla. 1996) 5, 12, 13, 14

Dannemann v. Shands Teaching Hospital and Clinics, Inc., 14 So. 3d 246 (Fla. 1st Dist. Ct. App.), *rev. denied,* 19 So. 3d 987 (Fla. 2009).....*passim*

Hannon v. Roper, 945 So. 2d 534 (Fla. 1st Dist. Ct. App.), *rev. denied,* 967 So. 2d 198 (Fla. 2007) .....*passim*

Kirkland v. Middleton, 639 So. 2d 1002 (Fla. 5th Dist. Ct. App.), *rev. dismissed,* 645 So. 2d 453 (Fla. 1994) 14

Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982).....11

McCuin v. Texas Power & Light Co., 714 F.2d 1255 (5th Cir. 1983) 10, 11

STATUTES

Section 95.11(4)(b), Fla. Stat. (2007) 2

Section 456.057(7)(a), Fla. Stat. (2007) 14

Section 456.057(8), Fla. Stat. (2007).....*passim*

Section 768.28(6)(a), Fla. Stat. (2007) 2

Section 768.28(9)(a), Fla. Stat. (2007) 2

CONSTITUTIONAL PROVISIONS

Amend. I, U.S. Const. 12

INTRODUCTION

Respondent Patricia Dannemann respectfully submits this Brief in Opposition to the Petition For a Writ of Certiorari filed by Petitioners. As explained below, there is no compelling reason for this Court's review, and the Petition therefore should be denied.

STATEMENT OF THE CASE

The Petition omits important details about the factual context in which this matter arose in the Florida courts. That factual context demonstrates that the decision for which review is sought – *Dannemann v. Shands Teaching Hospital and Clinics, Inc.*, 14 So. 3d 246 (Fla. 1st Dist. Ct. App.), *rev. denied*, 19 So. 3d 987 (Fla. 2009) – properly foreclosed a practice that abused the attorney-client relationship.

Respondent brought the action below against Shands Teaching Hospital and Clinics, Inc. ("Shands"), for negligence of its nursing staff resulting in the death of Respondent's husband, Stephen Dannemann. Respondent's complaint alleges that Shands' nurses, during routine turning of Mr. Dannemann from side to side, negligently pulled a previously attached tube from his heart, causing him to hemorrhage into his chest, resulting in his death.

In the course of the lawsuit, Respondent's counsel sought to schedule depositions of the three Petitioner

physicians. Dr. Beaver was one of Mr. Dannemann's treating physicians. Drs. Normann and Cardona were not involved in Mr. Dannemann's care; *they are pathologists who participated only in the post-mortem examination of the deceased.*

The doctors and their employer, the University of Florida Board of Trustees ("UFBOT"), *are not and will not be defendants in the case.* Respondent does not claim that any of the doctors did anything wrong. She has made clear that she will not sue them or their employer, UFBOT – in fact, it is clear that *she is barred by law from suing them.*[1] It is thus undisputed that neither the doctors – two of whom in any event are pathologists who did not see Mr. Dannemann until after he was dead – nor UFBOT have any expectation whatsoever of being sued for Mr. Dannemann's death.

Nevertheless, the University of Florida Self-Insurance Program ("SIP" or "UFSIP"), which insures and defends Shands, UFBOT and UFBOT's doctors, hired counsel, at SIP's expense, to represent the three doctors in connection with their depositions. In the

---

[1] It was unrebutted in the lower courts that the applicable two-year statute of limitations in section 95.11(4)(b), Fla. Stat., has expired; that the three-year notice of claim period in section 768.28(6)(a), Fla. Stat., also has expired; and that the doctors and UFBOT are statutorily immune from suit under section 768.28(9)(a), Fla. Stat. (immunity applies absent an allegation of wanton, willful misconduct outside the course and scope of employment).

lower courts the Petitioner physicians made no pretense that they themselves had sought out legal representation; their identical affidavits, prepared for them by their SIP-appointed counsel, state merely that they "have agreed to allow [the same SIP-selected counsel] to represent" them.

SIP's assignment of counsel to represent the Petitioner physicians in this case continued a long-standing, and very troubling, practice of SIP: the use of assigned counsel as a conduit for an illicit flow of information about defense theories among Shands (the only defendant in the case), SIP (Shands' insurer), and non-party UFBOT physicians, through their common denominator – the lawyer assigned by SIP to represent the doctors.[2] This is the real harm that concerns Respondent, and other litigants against Shands, and which *Dannemann* and, before it, *Hannon v. Roper,* 945 So. 2d 534 (Fla. 1st Dist. Ct. App.), *rev. denied*, 967 So. 2d 198 (Fla. 2007), addressed: not so much a disclosure between the doctors and their attorney, but, rather, the potential for

---

[2] For example, the lower court record contains an excerpt from the trial transcript in another case against Shands, in which, as here, SIP hired an attorney (indeed, the same attorney as here) to represent another non-party UFBOT physician. In that case, the doctor acknowledged that the attorney and a SIP representative had engaged him in an ex parte, pre-trial conference to discuss the details of his treatment of the plaintiff's decedent and how the doctor could best "enlighten the jury" in his testimony. As disclosed in the lower court record, SIP has made it a practice to orchestrate this sort of back-channel line of communication.

clearly prohibited disclosures between the doctors or their assigned attorney, on the one hand, and, on the other hand, Shands, Shands' counsel and SIP representatives involved in Shands' defense.

That this is what is really at stake is made clear by Petitioners' own arguments, both in the courts below[3] and in their Petition to this Court.[4] These

---

[3] For example, the Petitioner physicians asserted in the trial court, through the identical affidavits prepared for them by their SIP-appointed counsel, that they should be free to discuss the deceased's confidential medical information not only with their SIP-appointed attorney, *but also "with UFBOT and . . . UFSIP, and Shands representatives, including . . . risk management and claims processing personnel, management and administrative employees. . . ."* (Emphasis added).

Furthermore, in their brief to the Florida First District Court of Appeal, Petitioners argued that section 456.057(8) could not be applied so as to "prevent *UFSIP risk managers* from having access to information from [the deceased's] treating physicians"; that the doctors should be free to communicate confidential patient information *"to UFBOT employees assigned to UFSIP, such as risk managers"*; that the doctors' SIP-appointed attorney *should be free to "transmit to UFSIP or Shands any protected information obtained [by the attorney] during such consultation [between the attorney and the nonparty doctors];* that there should be *no bar to "communications between a UFBOT-employed physician's lawyer, and UFSIP personnel"*; and that *confidential medical information cannot "be kept away from risk and claims [i.e., SIP] personnel."* In sum, Petitioners sought a broad ruling that section 456.057(8) "does not preclude attorney-client communications *or communications to risk managers*." (Emphases added).

[4] In the Petition, at page 17, Petitioners argue that they should be free to discuss confidential patient information not only with counsel, but also with "employers" and, of more

(Continued on following page)

arguments expose that the true interest Petitioners seek to advance is not the doctors' interest in consulting with counsel; it is the interest of Shands, SIP, and their defense team in communicating with the doctors, through the attorney that SIP hired for them. These arguments also reveal that the doctors are not the real parties in interest, and are not the ones making the arguments; Shands and SIP are.

The decisions of the Florida First District Court of Appeal in *Hannon* and *Dannemann* follow the Florida Supreme Court's holding in *Acosta v. Richter,* 671 So. 2d 149 (Fla. 1996), that section 456.057(8) (then numbered as section 455.241) "clos[ed] the door to the previous practice of many defense attorneys of meeting privately or otherwise communicating ex parte with plaintiff's treating physician." *Id.* at 152. The Florida Supreme Court thus foreclosed precisely the sort of impropriety about which Respondent is concerned: that SIP will use the attorney it hired as a conduit to debrief the non-party physicians so that the doctors will know the "party line" of Shands' SIP-funded defense. *Id.* at 156 ("We believe it is pure sophistry to suggest that the purpose and spirit of the statute would not be violated by such conferences.").

---

concern, with unspecified "management personnel." In the circumstances of this case, it fair to presume that "management personnel" is intended to encompass SIP risk managers involved with Shands' defense team.

This concern is underscored in this case by the fact that two of the three non-party doctors are ***pathologists*** who did not see Mr. Dannemann ***until after he died***. In the Florida courts, Petitioners sought to justify the three doctors' disclosure of Mr. Dannemann's privileged medical information to their attorney on the argument that the doctors needed legal advice to evaluate whether they should reasonably expect to be sued. Petitioners never offered an explanation as to why the ***pathologists*** would need legal advice as to whether ***they*** should reasonably expect to be sued. Respondent submitted in the courts below, and submits here, that the only plausible explanation for this obvious anomaly is the disturbing one posited above: that Shands and SIP seek to exploit the attorney-client relationship as a subterfuge to circumvent the plain language of section 456.057(8), and make sure that the pathologists know Shands' and SIP's defense theory as to the cause of Mr. Dannemann's death.

It is also significant that the Petitioner physicians have sworn, in the affidavits prepared for them by their SIP-appointed counsel, that they have *no information* about the deceased's medical care or condition other than what is contained in the medical records that Shands maintains. Petitioners emphasize that those records have now been the subject of discovery in the trial court, and as a result their contents are known to Shands, UFBOT and SIP.

Accepting all of that as true leads inescapably to the conclusion that the doctors have no information

that they could provide to an attorney to assist in evaluating whether they should reasonably expect to be sued – which Petitioners insisted throughout the lower court proceedings is the reason why the doctors needed counsel – other than what the attorney can see for himself in the medical records. It appears, therefore, based on Petitioners' own submissions below, that the purpose for the attorney-client communication *in this case* is not to facilitate the doctors' disclosure of information to the attorney, but, rather, the opposite: to facilitate the *attorney's* disclosure of information *to the doctors*. In light of SIP's past practice, it can reasonably be inferred that this reverse flow will include information about the defense theories of Shands' and SIP's defense team.

Tellingly, despite ample opportunities to do so, Petitioners have *never denied* – not in the trial court, nor in the First District, nor in the Florida Supreme Court – that that is exactly what they intend to do.

Under *Dannemann* and *Hannon*, the Petitioner physicians are free to retain counsel of their choosing; they may be represented by counsel during their depositions; and they may consult with counsel in anticipation of their depositions, with one restriction: since the doctors and their employer, UFBOT, have not been sued and will not and cannot be sued, the consultation may not include discussion of Mr. Dannemann's confidential medical information. That one restriction properly forecloses Shands' and SIP's

practice of funneling defense theories to the non-party doctors through SIP-appointed counsel.

ARGUMENT

This Court's review is unwarranted, and the Petition therefore should be denied, for the following reasons: (i) Petitioners seek judicial approval to continue a practice that has subverted, not upheld, the attorney-client relationship; (ii) *Dannemann* does not deny the Petitioner physicians the right to counsel of their choosing; and (iii) the Petitioner physicians' legitimate right to consult with counsel is not infringed by section 456.057(8)'s privacy right. These reasons for denial of review are addressed separately below.

I. Petitioners Seek To Subvert, Not Uphold, The Attorney-Client Relationship.

As noted above, the record of the proceedings below makes clear that the true interest sought to be advanced in this case is not the doctors' interest in consulting with legal counsel. It is the interest of Shands, SIP and their defense team in communicating with the doctors, through the lawyer chosen for them by SIP. That is why Shands and UFBOT insisted in the Florida courts that ***the doctors' SIP-assigned lawyer should be free to "transmit to UFSIP or Shands any protected information***

obtained [by the lawyer] during such consultation [between the lawyer and his ostensible client, the non-party physician]." That is why they sought judicial authorization, despite section 456.057(8)'s plain prohibition, for unrestricted "communications ***between a UFBOT-employed physician's lawyer, and UFSIP personnel.***"

This position, if it were to receive the judicial stamp of approval that Petitioners seek, would not uphold the attorney-client relationship; to the contrary, it would authorize the subversion of that relationship, by authorizing precisely that which Respondent fears: use of SIP-appointed counsel as a conduit to funnel information about Shands/SIP defense theories to non-party physicians who have not been sued and have no expectation whatsoever of being sued – and who, presumably for that reason, did not themselves seek out legal representation.

The record in the proceedings below shows, moreover, that this fear is not hypothetical; it is, rather, well-founded, because it is exactly the practice in which Shands and SIP engaged in other cases before they were foreclosed from doing so in *Hannon* and then again in *Dannemann*. The importance of the attorney-client relationship in our system of justice is far too great to risk its being used for the ulterior purposes intended by Shands and SIP.

II. Dannemann Did Not Deny The Petitioner Physicians The Right To Retain Counsel Of Their Choosing.

Petitioners cite cases holding that in civil litigation as well as criminal cases there is a right to retain counsel of one's own choosing. The holdings in *Dannemann* and *Hannon* are not to the contrary. The Petitioner physicians are free to retain counsel of their choosing to represent them in connection with their depositions. The only restriction that *Dannemann* and *Hannon* impose on that freedom is that the attorney may not be one appointed by SIP for the purpose of funneling information back and forth between the doctors and the Shands/SIP defense team.

That limitation implicates no constitutional protection. As the Fifth Circuit recognized in *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255 (5th Cir. 1983) – one of the cases cited in the Petition – while civil litigants' right to counsel "ordinarily implies a right to lawyers of their choice," that right

> . . . *does not, however, entail absolute freedom of choice*. Counsel must be a member of the bar and must be admitted to practice before the court in which he appears. He must not have a conflict of interest with another party. His employment must not entail disclosure of confidential information. *The choice is never completely unfettered.*

* * *

> * * * The right [to counsel] should be balanced in cases in which it is challenged against the right to "untainted prosecution of the lawsuit" and society's need to maintain the highest ethical standards of professional responsibility. It cannot be exercised without thought also to the needs of effective administration of justice. * * *

Id. at 1262-63 (Emphases added).

See also Martin v. Lauer, 686 F.2d 24, 32 (D.C. Cir. 1982) (attorney-client privilege may be limited "where the privileged relationship is abused").

Those considerations, in the peculiar factual context of this case, richly support – indeed, Respondent submits that they *compel* – the limitation set down in *Dannemann* and *Hannon.*

III. Physicians' Legitimate Desire To Consult With Counsel Is Not Infringed By Section 456.057(8)'s Privacy Right.

Section 456.057(8) reflects a careful and constitutionally permissible balancing of patients' expectation that their confidential medical information will remain private, with health care practitioners' legitimate need for disclosure of that information in certain circumstances. Among the statute's exceptions, for example, is one that allows disclosure among health care providers who are involved in the patient's treatment, during the time that the patient is under their care. Another exception is the one that

was at issue below, which allows the provider to disclose confidential patient information "when [the provider] is or reasonably expects to be named as a defendant."

The First District Court of Appeal's application of the latter exception in *Dannemann* is consistent with the Florida Supreme Court's "common sense interpretation" of the exception in *Acosta v. Richter*, 671 So. 2d 149, 156 (Fla. 1996). As the Florida Supreme Court observed in that case, "a defendant-physician is free, under the statute, to discuss his knowledge of the patient in order to properly defend himself" – that is, otherwise confidential patient information "may be disclosed by a health care provider to his attorney if the provider expects to be named as a defendant in a negligence case." *Id.* (quoting legislative history of the statute).

The Florida Supreme Court further found in *Acosta* that the Florida legislature's "balancing [of] a patient's individual privacy with society's reasonable need for limited disclosure of medical information," as that balance was struck in section 456.057(8), raised no constitutional concern, and was within the legislature's "considerable latitude in providing Florida citizens with a high degree of privacy in their medical information." *Id.*[5]

---

[5] Petitioners argue that *Acosta* is distinguishable because, although in that case the statute *was* challenged on First Amendment free speech grounds, nevertheless the challenge did

(Continued on following page)

Nothing in the facts of this case warrants a reconsideration of the Florida Supreme Court's conclusion that section 456.057(8) reflects a constitutionally permissible balancing of interests. Indeed, there simply is no legitimate competing interest to balance in this case. No one disputes that the doctors can be represented by counsel at their depositions. Nor is it seriously disputed that the doctors (again, *two of whom are pathologists who never saw the deceased alive*) have no reasonable expectation of being sued, because of the running of the statute of limitations and their statutory immunity from suit, if nothing else.

Further, the doctors themselves have testified that they *have nothing to disclose* about Mr. Dannemann except what is contained in the Shands medical records, which have been the subject of discovery in the trial court.[6] Therefore, if the doctors

---

not arise in a so-called "right-to-counsel" context. Respondent submits, however, that the concerns are nevertheless the same. Indeed, under the facts in this case, where Shands and SIP seek to use the attorney-client relationship as a subterfuge, the conclusion that constitutional protection is lacking is even more compelling than was the case in *Acosta*, where at least the subterfuge did not involve exploitation of attorney-client communications.

[6] In the courts below, Shands and SIP tried to use that testimony to argue that, since the doctors have no information to disclose, there is nothing in section 456.057(8) to preclude their participating in discussions about Mr. Dannemann with Shands, SIP and the Shands/SIP defense team, including legal counsel. However, even if it were true that the doctors themselves have

(Continued on following page)

desired a legal opinion that they are not subject to liability, that opinion can be rendered – indeed, would necessarily have to be rendered – based on the medical records alone. The doctors, by their own testimony, have nothing to add to those records.

The only competing interest here is Shands' and SIP's illegitimate interest in maintaining a back-channel line of communication from the Shands defense team to the doctors, through counsel selected for the doctors by SIP, so the doctors can be forewarned about Shands' and SIP's defense theories. This improper practice enjoys no constitutional protection. *Dannemann, Hannon* and *Acosta* properly foreclosed it. Indeed, to allow the practice to continue, with judicial approval, would seriously erode the confidence of litigants, and the public, that – at least

---

no information to disclose, other than what the records show, they are still precluded by Florida law from "discuss[ing]" Mr. Dannemann's medical condition "with any person," except in statutorily-defined circumstances not presented here. Section 456.057(7)(a), Fla. Stat. (Petitioners do not challenge that subsection of the statute.) *Acosta* appropriately disapproved such ex parte conferences in which the physician says nothing, but learns from the other participants the "party line" about the defense of the case, so that the physician can pattern his or her testimony accordingly. 671 So. 2d at 156. As *Acosta* also observed, such unsupervised ex parte conferences must be avoided, because "medical malpractice plaintiffs could not object and act to protect against inadvertent disclosure of privileged information, nor could they effectively prove that improper disclosure actually took place." *Id.* at 153 (quoting *Kirkland v. Middleton*, 639 So. 2d 1002, 1004 (Fla. 5th Dist. Ct. App.), *rev. dismissed*, 645 So. 2d 453 (Fla. 1994)).

where Shands and SIP are concerned – the process of finding the truth through discovery and trial proceedings is conducted fairly and on a level playing field.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted this 22nd day of February, 2010.

TAYLOR & TAYLOR P.A.

JAMES J. TAYLOR JR.
Florida Bar No. 334057

Post Office Box 2000
Keystone Heights, Florida 32656
Telephone: 352-473-8088
Email: jtaylor@taylorandtaylorpa.com

Attorneys for Respondent

Supreme Court, U.S.
FILED
MAR 2 - 2010
OFFICE OF THE CLERK

No. 09-725

IN THE
Supreme Court of the United States

THOMAS M. BEAVER, M.D.;
SIGURD J. NORMANN, M.D.; DIANA CARDONA, M.D.;
and THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,

Petitioners,

v.

PATRICIA DANNEMANN,

Respondent.

On Petition for a Writ of Certiorari to the Florida First District Court of Appeal

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUSAN L. KELSEY
KELSEY APPELLATE LAW FIRM, P.A.
115 N. Calhoun Street
Tallahassee, FL 32301
(850) 681-3511

Attorney for Petitioners

TABLE OF CONTENTS

REPLY 1

CONCLUSION 8

TABLE OF AUTHORITIES CITED

PAGES

CASES

Acosta v. Richter,
671 So. 2d 149, 156 (Fla. 1996) 7

Upjohn Co. v. United States,
449 U.S. 383, 389 (1981) 6

FLORIDA STATUTES

§ 456.057 1

§ 1004.24 1

§ 1004.41(4)(d) 1

OTHER AUTHORITIES

Florida Board of Governors Reg. 10.001 2

REPLY

It's Not About The Identity or Structure of the Insurance Provider

The Response consists largely of attempts to distract from the merits of the single right-to-counsel issue presented, which arises from the Florida court's interpreting section 456.057(8), Florida Statutes, as prohibiting Petitioners from communicating freely with their *own* legal counsel about the very subject matter Respondent seeks to address in deposing the individual Petitioners. Respondent's new argument consists of irrelevant and unfounded accusations against the self-insurance program that is required by law to provide coverage, litigation defense services, risk management, and claims management, to the University of Florida Board of Trustees and its employees, *and* to Shands Teaching Hospital & Clinics, Inc. and its employees.[1] Notably, however,

---

[1] Shands is a teaching hospital that provides a clinical setting for the University of Florida. The medical care at issue in the underlying case was provided at Shands, by physicians employed by UFBOT. A single self-insurance program, the University of Florida Self-Insurance Program, works with both as required by Florida law. *See* § 1004.24, Fla. Stat. (authorizing self-insurance programs); § 1004.41(4)(d), Fla. Stat. (authorizing the University

neither the Florida appellate decision under review [Pet. App. 1a], nor the trial court's underlying order [Pet. App. 5a], mentions these bare accusations at all, let alone addresses their merits (or lack thereof). They are classic red herrings, and deserve no attention.

The one utility of Respondent's rhetoric is to illustrate the great breadth to which Respondent is willing to extend the denial of the right to meaningful legal counsel. By Respondent's reasoning, individuals and entities who happen to be insured by the same company – a frequent occurrence particularly in the field of healthcare insurance where a very few companies cover the vast majority of insured institutions in a single market – are more limited in their right to meaningful assistance of legal counsel than are individuals covered by separate insurers. This logical extension of Respondent's argument illustrates its weakness, for it makes no sense and implicates fundamental constitutional principles to infringe on the constitutional right to counsel on the basis of whether a single insurance carrier covers more than one party to litigation. If there were ever a case where that connection were abused – and this

---

of Florida to provide Shands with "comprehensive general liability insurance including professional liability from a self-insurance trust program established pursuant to s. 1004.24"); *see also* Florida Board of Governors Reg. 10.001 (governing state university self-insurance programs).

is not such a case – there are specific, narrow remedies for it, but those available remedies *never* include deprivation of the right to counsel.

By further logical extension, Respondent's heavy reliance on phantom "abuses" of the attorney-client relationship [Resp. 4-5, 10-11], suggests that in all cases in which *no* such abuse occurs, individuals may have unfettered communications with counsel of their choice. No court has found any such abuse here, nor has Respondent even attempted to secure such a finding. *Ergo*, the right to counsel and to communicate freely with counsel must remain intact here.

It's Not Up To Plaintiffs To Dictate the Content of Attorney-Client Communications.

Respondent argues that because two of the UFBOT physician/deponents were pathologists who did not treat the decedent, and because all of the decedent's medical information was already contained in medical records, there could be no legitimate reason for the physicians to consult with legal counsel about that medical information. [Resp. 6-7] The complete answer to this argument is that it is no one's business – not the plaintiff's, not the trial court's, no one's – what a client wants to discuss with a lawyer. That again is the very nature of an attorney-client relationship, and it is why, for instance, the rules of attorney ethics prohibit an attorney from revealing even the fact or the purpose

of a consultation, without the client's consent. And, *if* it is dispositive that the physicians have no information outside of that contained in written medical records, where is the constitutional justification for Respondent's intense desire to separate these physicians from their legal counsel and then depose them?

If it were relevant at all to establish some reason that an outsider to the attorney-client relationship might find acceptable justification for the consultation, the record here more than amply supplies the need. First, Respondent called these three physicians to testify in a *legal* proceeding *about* the decedent's medical information. An undeniable logical connection ties together the situation – a deposition; the subject matter – medical care provided by the physicians or their co-employees; and legal counsel – the guide to legal rights and obligations. Second, physicians have legitimate concerns about their own personal exposure when being drawn into a lawsuit arising out of medical care they provided or as to which they have information. They do not even know if they *have* any exposure, either in the pending lawsuit, in a new lawsuit, in state regulatory proceedings, or with respect to their employment status and obligations to their employer, without consulting legal counsel – i.e., communicating meaningfully with counsel on the basis of the factual setting presented.

As to Respondent's claim that pathologists have no legitimate right to counsel because they did not "treat" the decedent, Respondent overlooks the investigatory role of a pathologist and the potential impact of such a physician's testimony on the employer's legal interests. This is, of course, precisely why Respondent wants to strip these physicians of their right to counsel, in hopes of using them as free expert witnesses to bolster the plaintiff's case. In sum, if their testimony is important enough to secure through deposition, then they have a right to legal counsel to determine their rights and the potential implications of their testimony. Though no disclosure of the content of attorney-client communication is required (or justifiable), all of these concerns more than suffice to demonstrate the legitimacy of the attorney-client consultations Petitioners seek to protect.

It's Not About "Retaining" Counsel.

Presenting another red herring, Respondent protests that no constitutional infirmity arises here, because the UFBOT-employed physicians have the right to "retain" counsel of their choice. [Resp. 10-11] This is not the issue. The issue is the right to "communicate" freely with legal counsel so as to have a meaningful attorney-client relationship. The Florida court ruled that the Florida statute on privacy of patient healthcare information must be construed to prohibit physicians from communicating with their legal counsel about *the very subject as to which those physicians are about to*

be deposed. It hardly matters that Respondent would allow the physicians' lawyers to sit in on the depositions – so long as there is no private attorney-client consultation – because by then the deprivation of the right to meaningful legal counsel has occurred already, and is perpetuated by restricting the communications that can take place during the deposition itself.

We ask again, as the trial court asked [Pet. App. 10a]: What legitimate state interest exists within the context of this case to prevent such a discussion? The Florida appellate court offered none, nor does Respondent. When pressed to engage in such a test, the Florida court declined, stating simply that the constitutional issue was necessarily decided, albeit *sub silentio*, in an earlier case, and would not be revisited. [Pet. App. 3a-4a]

The constitutional infirmity is plain. A lawyer deprived of the very information as to which legal advice is sought is no lawyer at all, because the essence of the attorney-client relationship is full and frank communication. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

It's Not About Revealing Medical Information To "Outsiders."

In the Response, all roads lead to the same phantom allegations of improper use of medical information [Resp. 12-13], leaving the merits of the real issue before the Court largely unaddressed.

Respondent attempts to invoke the Florida Supreme Court's prior decision prohibiting a defense lawyer from obtaining medical information about the plaintiff *from someone other than his own client,* without even acknowledging that clear and material factual distinction between that case and this one. *Acosta v. Richter,* 671 So. 2d 149, 156 (Fla. 1996). Respondent can point to nothing in the statute, nothing in *Acosta,* nothing in any other case, disclosing an intentional and knowing decision to prohibit a physician from communicating with that physician's *own legal counsel* about the very subject matter the physician must address in a deposition. Respondent can point to nothing whatsoever revealing a conscious recognition of the tension between the right to privacy and the right to counsel, let alone any attempt to assert a legitimate state interest justifying the subrogation of the latter to the former. Respondent has nothing to say on these points because there is no such authority. Nothing whatsoever establishes that the interpretation of the statute that the Florida court advanced, and that Respondent defends, was informed by a knowing analysis of these issues. It was not. Once subjected to the appropriate constitutional analysis, the Florida court's interpretation of the statute cannot stand.

CONCLUSION

The Court should grant the Petition, reverse the Florida court's decision, and remand for further proceedings in which the right to counsel – and specifically the right to communicate fully and freely with counsel – is fully protected.

Respectfully submitted,

Susan L. Kelsey
KELSEY APPELLATE LAW FIRM, P.A.
115 N. Calhoun St.
Tallahassee, FL 32301
Ph. (850) 681-3511
Attorney for Petitioners

March 2, 2010

MOTION FILED

JAN 2 1 2010

No. 09-725

IN THE

Supreme Court of the United States

THOMAS M. BEAVER, M.D.;
SIGURD J. NORMANN, M.D.; DIANA CARDONA, M.D.;
and THE UNIVERSITY OF FLORIDA BOARD OF TRUSTEES,
Petitioners,

v.

PATRICIA DANNEMANN,
Respondent.

On Petition for a Writ of Certiorari to the Florida First District Court of Appeal

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE THE FLORIDA DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

ANDREW S. BOLIN
BURTON, BEYTIN & MCLAUGHLIN
201 N. Franklin Street
Suite 2900
Tampa, FL 33602
(813) 226-3000

BETSY ELLWANGER GALLAGHER
Counsel of Record
KUBICKI DRAPER
201 North Franklin Street
Tampa, FL 33602-5893
(813) 204-9776

CARYN L. BELLUS
Chair of Amicus Curiae Committee for the FDLA
KUBICKI DRAPER
25 West Flagler Street
Miami, FL 33130-1790
(305) 374-1212

Attorneys for Amicus Curiae

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The Florida Defense Lawyers Association ("FDLA"), by and through its undersigned counsel, hereby moves this Honorable Court for the entry of an Order granting the FDLA leave to appear as amicus curiae in the above captioned matter and in support thereof states:

1. The FDLA is a statewide organization of tort and insurance defense attorneys with over 1,000 members. This appeal involves issues that are of great importance to individuals represented by FDLA members who are subpoenaed to testify in Florida tort cases.

2. Specifically, the issues involved in the appeal effect the constitutionally protected right to engage in free speech within the context of the attorney-client relationship.

3. All counsel of record received timely notice of FDLA's intent to file an amicus curiae brief at least ten days prior to January 21, 2010 pursuant to Supreme Court Rule 37(2)(a). On January 9, 2010 James J. Taylor, Esq., responded via facsimile stating that he objects to FDLA appearing as amicus curiae.

4. Both the Florida Defense Lawyers Association and the Florida Justice Association (or its predecessor the Academy of Florida Trial Lawyers) appeared as amicus curiae by consent on the merits in the state court case involving plaintiff Dannemann, and on earlier cases involving the same central issues. *See Hannon v. Roper, 945 So.2d 534 (Fla. 1st DCA 2006); Michlik v. University of Florida Bd. of Trustees,* 17 So.3d 908 (Fla. 1st DCA 2009).

5. Because the members of the FDLA are regularly engaged in representing clients whose rights would be affected if the lower Court's ruling is allowed to stand, the FDLA is uniquely situated to file this amicus curiae brief, and the FDLA has a significant interest in the issues on appeal

6. The FDLA, as amicus curiae, can provide relevant materials to the Court not already brought to its attention by the parties and may be of considerable help to the Court in accordance with Supreme Court Rule 37 and should be granted leave to file this amicus curiae brief.

Therefore, the FDLA respectfully requests the entry of an Order granting it leave to file this amicus curiae brief

Respectfully submitted,

Andrew S. Bolin
Burton, Beytin & McLaughlin
201 North Franklin St
Suite 2900
Tampa, FL 33602
Ph. (813) 226-3000
Attorney for Amicus Curiae
Committee for the FDLA

Betsy E. Gallagher
Kubicki Draper
201 North Franklin St.
Tampa, Fl 33602
Ph. (813) 204-9776
Counsel of Record

Caryn L. Bellus
Kubicki Draper
25 West Flagler Street
Miami, FL 33130-1790
(305) 374-1212
Chair of Amicus Curiae
Committee for the FDLA

Dated January 21, 2010.

TABLE OF CONTENTS

Statement of Identity and Interest of Amicus Curiae.....1

Summary of Argument.....2

Argument.....3-11

Conclusion.....12

TABLE OF AUTHORITIES

STATUTES

§456.057 (8).....2,5

§394.4615.....6

42 U.S.C.A. 290dd-2.....6

CASES

Fabre v Martin, 623 So.2d 1182 (Fla. 1993).....7

Hunt v Blackburn, 128 U.S. 464, 470 (1888).....5

McCuin v Texas Power & Light Co., 714 F.2d 1255 (C.A. Texas 1983).....9

Texas Catastrophic Property Insurance v Morales, 975 F.2d 1178 (C.A. Texas 5th 1992).....9

Trammel v United States, 445 U.S. 40, 51 (1980).....4, 10

Upjohn Co. v United States, 449 U.S. 383, 389 (U.S. Mich.
1981).....4

OTHER AUTHORITIES

The Attorney Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement.....10

ABA Code of Professional Responsibility Ethical Consideration 4-1.....6

STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

The Florida Defense Lawyer's Association ("FDLA") is a statewide organization of tort and insurance defense attorneys with over 1,000 members[1]. The FDLA regularly provides amicus briefs to appellate courts in cases presenting significant issues of tort law and trial or pre-trial practice. The FDLA is uniquely situated to provide this court with commentary on whether a State court can prohibit an individual from communicating freely with legal counsel when they are subpoenaed, as a non-party, to provide deposition or trial testimony in a case alleging damages in tort. FDLA's members are regularly engaged to represent clients in response to subpoenas for testimony. The FDLA's members represent clients not only in a healthcare context but across a broad spectrum of industries, whose fundamental rights to counsel and to engage in free speech within the context of the attorney-client relationship would be impeded if this Court allows the ruling of Florida's First District Court of Appeal to stand.

---

[1] In accordance with Rule 37.6, *amici* state that no counsel for either party has authored this brief in whole or in part, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Florida's First District Court of Appeal incorrectly interpreted Florida's Patient Privacy statute, section 456.057 (8), Florida Statutes (2007), and in so doing invaded vital and fundamental rights of individuals who have been called to testify as witnesses in cases alleging damages in tort. Specifically, the court's interpretation of the Florida Statute impeded an individual's or entity's right to engage an attorney and enjoy the benefit of full counsel so that the individual who has been subpoenaed to take part in the tort action has the ability to engage in full and frank discussions with counsel in order to insure the protection of their rights and obtain meaningful representation by the attorney of their choice.

The State court decision allows Florida's Patient Privacy statute to supersede the bedrock principles of an individual's federal constitutional guarantees of free speech under the First Amendment of the United States Constitution, the due process clause of the Fourteenth Amendment and an individual's guarantee of the right to legal counsel. The decision should be quashed as unconstitutional because these rights, which are the fundamental principles of our justice system, were infringed upon in the utter absence of any compelling state interest sufficient to warrant such a restraint and infringement on the constitutional rights of individuals brought into litigation as fact witnesses.

ARGUMENT

I. THE FLORIDA FIRST DISTRICT COURT OF APPEAL IMPROPERLY ERODED LONGSTANDING AND FUNDAMENTAL RIGHTS OF INDIVIDUALS INVOLVED IN LITIGATION IN FAVOR OF A STATE PRIVACY STATUTE

Florida's First District Court of Appeal decided *Dannemann* in a way that erodes the right of individuals in the State of Florida to retain counsel of their choice, and to engage in full and frank discussions with their attorney so that they may enjoy the benefit of meaningful representation.

The widespread implications of the First District's ruling have an extremely troubling effect on individuals who have been called to testify as a witness in cases alleging damages in tort, who seek the advice of counsel as to the possible legal implications of their testimony including the effect their testimony may have against their own interests. By prohibiting an individual from engaging in communication with their attorney in favor of a State patient privacy statute, the Florida court has set a dangerous precedent that such statutes are to be given greater weight than the primary right to counsel. The effect of the Florida decision is to discourage individuals from consulting with attorneys as to their legal rights and responsibilities.

The error of the Florida decision is clear when viewed in light of the history of the attorney-client privilege and the importance this Court has placed on that privilege. Neither the physician-patient privilege, nor other privileges implicated by a State privacy statute, is entitled to more protection than the attorney-client relationship.

The protection of communications between client and lawyer, as embodied in the attorney–client privilege, has been a bedrock principle of our justice system for hundreds of years. The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby to promote broader public interests in observance of law and the administration of justice. *See Upjohn Co. v. United States,* 449 U.S. 383, 389 (U.S. Mich. 1981). The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. *See id.* The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out. *Trammel v. United States*, 445 U.S. 40, 51 (1980).

This Court has long upheld the importance of meaningful, substantive, complete, and confidential attorney-client communication.

In *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888), the Court espoused that the privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."

The Florida court's ruling flies squarely in the face of this Court's pronouncement not only by creating apprehension over having open and frank communication, but also by establishing adverse consequences for the disclosure of any such information and pronouncing the client to be in violation of a State privacy statute by engaging in what had previously been considered valid and vital communication with an attorney.

The Florida court's decision has broad-based implications that extend well beyond the specific facts of this case, to all manner of situations in which individuals and entities may wish to seek legal counsel for all manner of reasons. Florida's physician-patient privilege is a statutory privilege set forth in section 456.057 (8), Florida Statutes (2005). Other State and Federal laws also create rights to privacy – and if the Florida court's reasoning is applied in all of these contexts, the impact on the right to counsel would be staggering.

For example, privacy is afforded to records regarding mental health counseling under Florida Statute §394.4615, and communications between substance abuse counselors and their clients under Federal law found at 42 U.S.C.A. 290dd-2. If the Florida court's decision in *Dannemann* is allowed to stand, and the patient privacy statute is allowed to supersede the attorney-client privilege, it stands to reason that other such statutes will be used to invade an individual's right to seek counsel on the implications of their testimony when subpoenaed. It is important to note that the court in *Dannemann* made no findings of a compelling state interest to warrant the restraint and infringement upon the privacy of the fact witnesses at issue. Left unchecked, such ad hoc analysis and such startling erosion of the right to counsel and the attorney-client privilege threaten to destroy the sanctity of the attorney-client relationship, and to discourage individuals from consulting with attorneys as to their legal rights and responsibilities. *See THE ATTORNEY-CLIENT PRIVILEGE: FIXED RULES, BALANCING, AND CONSTITUTIONAL ENTITLEMENT, Harvard Law Review, December 1977.*

Those who are subpoenaed in cases alleging damages in tort, where their involvement with the plaintiff implicates a State privacy statute, are placed in an impossible situation wherein they are forced to either infringe on the plaintiff's privacy according to the state court's ruling, or be forced to testify without first having the aid and advice of counsel, potentially placing themselves, their property and their very livelihood at stake without the benefit of their constitutionally guaranteed right to counsel. Further, such uncounseled testimony has the very real potential to jeopardize the legal interests of such individuals' employers.

Thus, from the perspective of the individual witnesses and their employers alike, the Florida court's interpretation of the patient-privacy statute impedes the attorney-client relationship and privilege to a depth utterly unjustified by a plaintiff's claimed right to privacy in information that the plaintiff himself has placed at issue in a public legal proceeding.

It is not enough, as the state court suggests, to have some reasonable expectation or confirmation from the plaintiff that the party subpoenaed to testify will not be sued by the plaintiff. With the exposure in Florida to being named on the verdict form under *Fabre v. Marin*, 623 So.2d 1182 (Fla. 1993), the implications of a witness's testimony stretch far beyond the concern of being sued by the plaintiff alone.

Individuals who are named as *Fabre* defendants, who are found liable by juries, face a host of potential legal consequences. Unnamed *Fabre* defendants can face claims for contribution or indemnity and in the case of a physician witness, can be reported to national and state databanks and credentialing committees, and face negative media exposure, all of which can adversely impact an individual's livelihood. This exposure runs afoul of the protection of the Fourteenth Amendment of the United States Constitution in its guarantee that "no state shall... deprive any person of life, liberty, or property, without due process of law..." Physicians who face the prospect of testifying at depositions justifiably need the ability to communicate with legal counsel about the deposition process, testimonial issues that will likely be presented and the legal and professional impact of the testimony upon a physician. Physicians likewise need to be able to communicate with their employers or former employers about care rendered during the period of employment. Physicians in their healthcare groups need, in a broader sense, to be able to communicate freely about patient care and treatment to conduct the statutorily mandated risk management, quality assurance, peer review and credentialing processes. Further, attorneys involved in those processes or those who are retained by intra-facility groups and insurance companies serve to promote better medical care and efficiency as long as they can communicate and advise physicians on legal matters related to confidential patient information.

The Florida court's decision also effectively destroys the right to counsel of those who have been called to testify as witnesses in tort cases. It is well settled that the right to representation is basic to the system of justice and extends to every facet of the judicial process. Representation of a party by his duly constituted attorney is fundamental to the administration of justice and there is a constitutionally guaranteed right to retain counsel in civil matters under the due process clause of the Fourteenth Amendment. *See Texas Catastrophic Property Insurance v. Morales*, 975 F.2d 1178 (C.A. Texas 5th 1992). The right to counsel, expressly guaranteed by the Sixth Amendment in criminal cases, is no less fundamental in civil cases, and springs from both statutory authority and from the constitutional right to due process of law. *See McCuin v. Texas Power & Light Co.*, 714 F.2d 1255 (C.A. Texas 1983). The Florida court has interpreted the state statute in such a way that it improperly gives a stranger to the attorney-client relationship – ironically, the very person whose act created the need for attorney-client consultation - the total authority to control the communication within that relationship.

In deciding when a person subpoenaed in a civil matter may hire an attorney, and in placing limitations on the ability to communicate for both client and attorney, the Florida court's decision has improperly eroded the right to meaningful representation, to the point where a person's constitutional right to counsel has been unconstitutionally violated. The need for an open and unfettered exchange of information is vital not only to the interests of the client but it is necessary to insure that the attorney can accomplish the ethical goals of any representation. As the Court noted in Trammel, "The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." ABA Code of Professional Responsibility, Ethical Consideration 4-1 states as follows:

> "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant.

> The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

See Trammel, 449 U.S. 383 at 391.

Thus, the State Court's decision in Dannemann creates a scenario where not only can effective representation not take place, but the attorney is forced to violate his or her ethical obligations by taking part in a representation that is truncated by the State Court's prohibitions.

CONCLUSION

The issues presented in this matter are extremely important to a broad range of physicians, hospitals, practice groups, healthcare educators, and risk management programs. The Florida Court's decision will have a widespread and prejudicial impact on health care in the state. Perhaps even more troublesome is the widespread implication that this ruling has on the fundamental tenets of the attorney-client relationship and the constitutionally guaranteed right to counsel as well as freedom of speech within the bounds of the attorney-client relationship. This Court should grant the Petition for Writ of Certiorari and quash the decision of the state court in order to uphold the principles of the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution and of the attorney-client privilege.

Respectfully submitted,

Betsy E. Gallagher
Kubicki Draper
201 North Franklin Street
Tampa, FL 33602-5893
Ph. (813) 204-9776
Counsel of Record

Andrew S. Bolin
Burton, Beytin &
McLaughlin
201 N. Franklin Street
Suite 2900
Tampa, FL 33602
Ph. (813) 226-3000
Attorney for Amicus
Curiae Committee for the
FDLA

Caryn L. Bellus
Kubicki Draper
25 West Flagler Street
Miami, FL 33130-1790
(305) 374-1212
Chair of Amicus Curiae
Committee for the FDLA

Dated: January 21, 2010.